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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

WARREN JOSEPH KING

Defendant and Appellant.

A130713

(Contra Costa County
Super. Ct. No. 05-100326-8)

Defendant was convicted following a jury trial of second degree murder (Pen. Code, § 187), with personal use of a firearm to cause death (Pen. Code, § 12022.53, subd. (d)), and unlawful possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)). The trial court separately found that defendant suffered three prior serious felony convictions (Pen. Code, § 667, subd. (a)(1)). Defendant was sentenced to a term of 15 years to life for the murder conviction, plus consecutive terms of 25 years to life for the firearm use enhancement and 15 years for the three prior serious felony convictions.

Defendant argues that the trial court ineffectively sanitized three prior felony convictions admitted to impeach his testimony. He also challenges the evidence offered to prove one of the prior serious felony conviction enhancements found by the trial court. We conclude that the admission of the sanitized prior similar convictions was neither an abuse of the trial court's discretion nor prejudicial to defendant. We agree with defendant that one of the prior serious felony conviction enhancements must be stricken

for lack of supporting evidence. We therefore affirm the judgment as modified to strike the five-year enhancement imposed for the third alleged prior serious felony conviction.

STATEMENT OF FACTS

On June 20, 2009, John Lyles was shot and killed during a physical altercation with defendant that erupted between them in front of the victim's residence. Defendant conceded that Lyles was shot during their fight, but claimed the shooting was the unintended result of an accidental discharge of a gun possessed by the victim.

When the shooting occurred, Lyles lived in the house at 2221 Potrero Avenue in Richmond, along with his "fiancée" Arletha Lands, her daughter Rickell Shackelford and niece Cynthia Jenkins, both of whom were then 18 years old. Lands operated a fitness center and physical therapy facility at the residence, called "Angel's Personal and Sports Training."

An elderly neighbor named "Miss Annie" lived across the street. Lands and Lyles periodically brought Miss Annie food and visited with her. About two months before the shooting, defendant moved into Miss Annie's house. Neither Lands nor Lyles became friendly with defendant or engaged in conversation with him, but Lands testified that he "would sit on the steps at Miss Annie's house" and call her name, "Angel," when she passed by, even if she was accompanied by Lyles. Lyles felt that defendant "was disrespectful" by addressing only Lands rather than both of them. Referring to defendant's exclamations to Lands, Lyles advised her to "ignore it," and she did so.

On the morning of June 20, 2009, Lands asked Shackelford and Jenkins to pass out "some fliers" for her fitness business at local shopping centers and parking lots. Around noon that day, defendant appeared at the house, knocked on the front door, and asked to see Shackelford. Defendant asked Shackelford if she wanted to purchase marijuana from him. Both Shackelford and Lands chastised defendant for "coming here trying to sell" marijuana, and asked him to leave. Defendant apologized and walked away, but as he left he warned Lands to "tell your old man to stop trying to size me up." Defendant also stated to Lands, "Tell your bitch-ass nigga to come outside."

When Lyles then came to the front door and opened the screen, defendant pushed him and exclaimed, “You ain’t nothing but a punk-ass bitch.” Lyles asked defendant, “What’s wrong with you?” Lands told defendant to leave, and he again apologized to her.

After defendant left, Lyles ran to the kitchen, opened a drawer, and retrieved a knife. Lyles was very angry, but Lands persuaded him to discard the knife. Lyles then went outside to smoke a cigarette on the front walkway, accompanied by Lands. Lands observed defendant sitting on the front porch of Miss Annie’s house across the street.

Shackelford and Jenkins proceeded to their car parked on the street in front of the house to distribute the fliers given to them by Lands. As they reached the car defendant walked back across the street and said to Shackelford, “Feel my stomach.” When Shackelford declined, he lifted his shirt to display a pistol to her. Shackelford asked defendant, “Why are you doing this?” She ran into the house and told Lands, “Mom, don’t let John come outside. He has a gun.” Shackelford then returned to the car and started to drive away, but stopped and turned around when she observed defendant “walking across the street” toward her house.

Lands testified that defendant approached Lyles in the yard with a “glove on his hand.” Defendant pushed Lyles and said, “Nigga, I ain’t no bitch.” Lyles responded, “What’s wrong with you. I don’t even know you.” Defendant pushed Lyles a second time, Lyles pushed back, and a fight between them ensued. Defendant fell into a bush near the house, and Lyles fell on top of him. According to Lands, Lyles did not want to continue the fight, and was attempting to move away when defendant pushed him. As Lyles stood on the lawn with his hands open defendant “reached in the side of his pants and pulled out a gun.” Both Lands and Shackelford testified that from a leaning or nearly standing position defendant immediately raised his arm and fired two shots at Lyles from close range.¹ Defendant said, “Now,” and walked away “like nothing ever happened.” Lyles died at the scene from asphyxiation and loss of blood caused by a single gunshot

¹ Shackelford heard only one shot.

wound that penetrated his chest, passed through the lungs and the “upper chamber of his heart,” and lodged in his back.

On July 1, 2009, defendant was detained on his bicycle by a Berkeley police officer. The officer recognized defendant as “a subject wanted from Richmond for homicide.” Defendant failed to comply with the officer’s request to “put his hands behind his back,” and fled on foot. Following a brief chase the officer caught and subdued defendant by taking him to the ground on his stomach. During a struggle defendant attempted to reach his right hand under his body to his waistband, but the officer restrained him and eventually, with the assistance of other officers, placed him in handcuffs. A .22-caliber revolver, with one empty chamber and eight live rounds, was discovered in defendant’s front pants pocket.

A ballistics expert examined the handgun, unexpended cartridges, and the bullet recovered from the victim’s body. The weapon is a “rimfire” type pistol. For the gun to fire, the firing pin must impact the rim around the rear of the cartridge and detonate the powder. A examination revealed that “trigger pull” of the gun was “on the heavy side.” According to the expert the trigger required a deliberate act to pull the hammer into a fully cocked position, making accidental firing quite taxing. Test firing of the cartridges found in the gun resulted in failure of some of the cartridges to detonate. The expert testified that the test-fired bullets had some of the same individual features and “class characteristics” of the “evidence bullet” recovered from the victim’s body, but not enough to “conclusively identify” the gun recovered from defendant as the weapon that fired the shot that killed Lyles. An examination of gunshot residue found on Lyle’s shirt indicated that the shot was fired from a distance of six to twelve inches from him.

The defense was based primarily on defendant’s testimony that he did not intentionally shoot the victim. Defendant recalled that in June of 2009, he was “spending a lot of time” at the home of his grandmother, Miss Annie, on Potrero Avenue in Richmond. He became acquainted with Lands and Shackelford in 2007, and saw them regularly at his grandmother’s house. He saw Lyles less frequently, but was polite to

him, although not overtly friendly. Defendant claimed he “never had any arguments” with Lyles.

Three or four days before the shooting occurred, Miss Annie was hospitalized. Lands and Lyles came over to ask if she was “all right,” and engaged in conversation with defendant on the front porch. Lyles mentioned that he “was trying to purchase” a gun. Defendant showed Lyles a .22-caliber pistol he bought a few days before for “two \$20 packages of cocaine.” According to defendant, Lyles was very familiar with the operation of the gun, and purchased it from him for \$80.

On June 20, 2009, defendant completed two drug deals, went with a friend to the liquor store, then cut across the victim’s lawn on his way home. Lyles was near the front steps of the house, smoking a cigarette. Lyles said, “hey cuz, let me holler at you.” Defendant agreed, and “walked over there.”

Lyles told defendant, “you need to stop trying to get at my woman.” Defendant wondered “where this was coming from.” He replied, “I’m not after that tramp.” They “started arguing,” and after defendant admittedly said “something kind of really harsh,” Lyles pushed him. Defendant became “heated,” and punched Lyles twice in the face. Lyles was stunned and stepped back. Defendant removed his sunglasses in anticipation of a fight and began to put them in his pants pocket, when he noticed that Lyles “pulled up his shirt” and grabbed a gun. Defendant grasped Lyles’s hands and they crashed into each other. As they struggled, defendant heard a shot, followed by Lyles’s exclamation, “ah.” Lyles stopped moving, and defendant realized “this dude is shot.”

Defendant did not know if his or Lyles’s finger was on the trigger, but denied that he intentionally shot the victim. Defendant also denied that he went to the front door of the house, talked to Shackelford about buying marijuana, or had an argument with Lyles, as Lands and Shackelford testified. He asserted: “That never happened.”

After the shooting defendant immediately grabbed the gun, put it in his pocket, and ran to an abandoned house a few blocks away. Defendant fled because he “had a parole warrant already out” for him, and “didn’t want to go to jail.” Lyles was “still standing” when defendant left.

On the day defendant was arrested he encountered a Berkeley police officer who asked to “have a word” with him. Defendant “wasn’t ready to go to jail,” so when the officer told him to put his hands behind his back, he spun away and ran. The officer chased him and pinned him “face first” to the ground. Defendant testified that he was “trying to comply,” but was flat on his stomach with the officer on his back and his hands jammed under him. He was unable to place his hands behind his back as the officer demanded. Defendant denied that he tried to reach for the gun in his waistband. When asked, defendant informed the officers that he had a gun in his “right pocket that belongs to the Richmond Police Department for a homicide.”

Kwamaine Martell, who had a brief “dating relationship” with Shackelford, testified for the defense that he observed her in possession of a “little revolver,” and heard her “brag” that “her and her mama have guns” and “know where to get guns.” Not long before the shooting occurred, Shackelford also told Martell that Lyles “got a gun a few days before.” Shackelford denied that she ever told Martell that Lyles had a gun or “could get a gun.” She also denied that she ever carried a gun in her car. Shackelford and Lands both testified that Lyles did not possess a firearm or keep one in the house.

DISCUSSION

I. The Admission of Prior Felonies to Impeach Defendant.

The prosecution proposed to offer as impeachment evidence five prior felony convictions suffered by defendant between 1985 and 1997. The trial court ruled that all five prior convictions were admissible to impeach defendant. The court authorized the prosecution to refer to convictions for receiving stolen property in 1985 and auto theft in 1989 by name and date. The court decided to “sanitize” the three remaining convictions for assault offenses and voluntary manslaughter by limiting the reference to “serious felonies” or “significant felonies,” and “the dates of the convictions.” Thus, during questioning by defense counsel defendant admitted that he was convicted of receiving stolen property in 1985, auto theft in 1989, and “serious felony” offenses in 1986, 1991, and 1997.

Defendant argues that the trial court “abused its discretion” by deciding to sanitize the impeachment evidence through the reference to “three of [his] priors as ‘serious felonies.’ ” He maintains that the court’s effort to ameliorate the prejudice inherent in the three prior “assault-related convictions” by limiting the admission of the impeachment evidence to a reference to “serious felonies” was “based on a legally erroneous analysis,” and “offended the principles set out in *People v. Castro* (1985) 38 Cal.3d 301.” His position is that the court erred by failing to “give the jurors any guidance on the meaning of a ‘serious felony,’ ” which invited speculation and failed to properly relate the prior convictions to the issue of credibility.

The California Constitution provides that: “ ‘Any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used *without limitation* for purposes of impeachment’ (Cal. Const., art. I, § 28, subd. (f) [subdivision (f)]), italics added.)” (*People v. Ballard* (1993) 13 Cal.App.4th 687, 691.² “Our Supreme Court has interpreted this to mean that ‘any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty,’ may be used to impeach a witness in a criminal proceeding ‘subject to the trial court’s discretion under [Evidence Code] section 352’ [Citation.]” (*People v. Dewey* (1996) 42 Cal.App.4th 216, 220; see also *Ghadrdan v. Gorabi* (2010) 182 Cal.App.4th 416, 421.)

“[T]rial courts retain their discretion under Evidence Code section 352 to bar impeachment with such convictions when their probative value is substantially outweighed by their prejudicial effect.” (*People v. Clair* (1992) 2 Cal.4th 629, 654, citing *People v. Castro, supra*, 38 Cal.3d 301, 306–313; 323.) In exercising their discretion, trial courts “should consider, among other factors, whether it reflects on the witness’s honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant’s decision to testify.” (*People v. Clark* (2011) 52 Cal.4th 856, 931.)

² Evidence Code section 788 states: “For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony”

“On appeal, the trial court’s decision is reviewed for abuse of discretion. [Citations.] To constitute an abuse of discretion, ‘the resulting injury [must be] sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, . . . the court [must] exceed[] the bounds of reason, all of the circumstances being considered.’ [Citation.] In most instances the appellate courts will uphold the exercise of discretion even if another court might have ruled otherwise.” (*People v. Feaster* (2002) 102 Cal.App.4th 1084, 1092; see also *People v. Clair, supra*, 2 Cal.4th 629, 655.)

The trial court’s exercise of discretion challenged by defendant in the present case focuses not on the admissibility of the impeachment evidence, but rather on the manner of sanitizing the prior felony convictions utilized by the court to minimize prejudice. Defendant suggests that the “meaning of ‘serious felony’ was left completely undefined and open-ended” by the court, creating the “potential for prejudicial speculation” and improper use of the “prior convictions as propensity evidence” by the jury. He asserts that the trial “court’s goal of sanitizing the prior[s] to avoid prejudice” was defeated by the court’s failure to either inform the jurors to avoid consideration of the impeachment evidence to prove “he committed the ‘serious felony’ charged in the case before them,” or clarify the bearing of the prior convictions on his credibility. Defendant adds that in light of the “central issue” of credibility in the case, the error was prejudicial to the defense.

The trial court’s effort to sanitize the prior convictions by admitting to them only as “serious felonies” “was an attempt to tread between the pitfalls of identifying the prior conviction[s] as . . . offense[s] similar or identical to the charged offense [citation], and not identifying the felon[ies] at all.” (*People v. Barrick* (1982) 33 Cal.3d 115, 127.) By precluding any reference to the prior convictions as assault or homicide offenses, the court prevented “direct prejudice” to defendant from the consideration of similar offenses by the jury for the proposition that “the defendant has a criminal disposition” to commit the charged crime. (*People v. Rollo* (1977) 20 Cal.3d 109, 119 (*Rollo*); see also *Barrick, supra*, at p. 127; *People v. Cole* (1982) 31 Cal.3d 568, 581.) Nevertheless, the California Supreme Court has declared the sanitizing device adopted by the court infringed upon the

jury's role as "arbiter of the probative effect" (*Rollo, supra*, at p. 118) of the convictions upon the defendant's credibility, and more importantly invited some natural speculation that the offenses may be identical or similar to the charged crime, or "involved some form of unspeakable conduct," or are convictions of a nature that are "especially damaging to the defendant's credibility." (*Id.* at p. 119.)³ The attempt to sanitize the prior assault and manslaughter convictions, while having a superficial appeal as an acceptable accommodation of the competing interests of the prosecution and the defense, failed to completely forestall the possibility that the jury may assume the prior offenses of an undisclosed nature are particularly heinous or indicative of lack of credibility – although they are not – and invited supposition by the jury that defendant previously committed similar crimes, with the resulting "improper presumption that 'if he did it once, he will do it again.' " (*Barrick, supra*, at p. 127.)

On the other side of the court's balancing equation, " '[n]o witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity.' [Citation.]" (*People v. Gray* (2007) 158 Cal.App.4th 635, 641.) Further, the sanitization "reduced the potential prejudice" of prior convictions by focusing the jury's attention on the effect of the those convictions on defendant's credibility rather than the similarity of the crimes to the charged homicide offense. (*Id.* at p. 642; see also *People v. Sandoval*

³ We observe that defendant's prior convictions for acts of violence, although crimes of moral turpitude, generally have little direct bearing on honesty and veracity, while other offenses, such as perjury, are intimately connected with the issue of credibility, and still others, such as robbery and burglary, are somewhat less relevant. (*People v. Beagle* (1972) 6 Cal.3d 441, 453–454, *People v. Elwell* (1988) 206 Cal.App.3d 171, 175.) In *Rollo*, a case in which the defendant was charged with and ultimately convicted of receiving stolen property, the court admitted impeachment evidence of a prior conviction of the crime of soliciting another to commit murder (Pen. Code, § 653f). (*Rollo, supra*, 20 Cal.3d 109, 115.) The trial court adopted the procedure of permitting the prosecutor to ask defendant if he had "been convicted of a felony" (*ibid.*) for the purpose of impeachment "without revealing to the jury the identity of the crime." (*Id.* at p. 118.) The California Supreme Court concluded that "the procedure adopted by the trial court gives the defendant the archetypal Hobson's choice of (1) remaining silent on the point and subjecting himself to the foregoing improper speculation by the jury, or (2) divulging the nature of his prior conviction and incurring an equally grave risk that the jury will draw an impermissible inference of guilt. Either way leads to prejudice: it is a game, in short, of heads the prosecution wins, tails the defendant loses. Surely this is too heavy a burden to place on the exercise of an accused's right to testify in his own behalf. We conclude that the trial court erred in casting the defendant into this dilemma." (*Id.* at p. 120.)

(1992) 4 Cal.4th 155, 178; *People v. Elwell*, *supra*, 206 Cal.App.3d 171, 175.) We find that the admission of the prior convictions as sanitized by the trial court was at least not an abuse of discretion, “notwithstanding the possibility of jury speculation.” (*People v. Massey* (1987) 192 Cal.App.3d 819, 825.) The unfavorable alternatives were to either admit the prior convictions without limitation and invite greater prejudice inherent in the consideration of similar crimes, or forbid use of the priors whatsoever, which would have given defendant’s testimony greater credibility than it deserved. (*Ibid.*)

Further, the trial court’s admission of the sanitized impeachment evidence, even if found to be an abuse of discretion, was harmless. The evidence that defendant initiated the confrontation with the victim and intentionally fired the shot that killed him was overwhelming. While defendant’s credibility was a crucial issue to the defense, his testimony was not only inconsistent with the unvarying accounts of numerous other witnesses, but inherently implausible, given his flight from the scene and subsequently from the police, the discovery of the handgun in his possession, and the expert testimony that the weapon was not susceptible to accidental firing as defendant described. The other properly admitted prior convictions for theft-related offenses convincingly impeached defendant’s testimony. The evidentiary ruling by the trial court also did not keep defendant off the stand: he testified at length, and had ample opportunity to present his case to the jury. That it was unpersuasive was not the fault of the trial court, but of the weakness of defendant’s story. (*Rollo*, *supra*, 20 Cal.3d 109, 121.) We conclude that it is not reasonably probable a result more favorable to defendant would have been reached in the absence of the admission and reference to the prior conviction impeachment evidence as serious felonies. (*People v. Cole*, *supra*, 31 Cal.3d 568, 581; *Rollo*, *supra*, at p. 121; *People v. Feaster*, *supra*, 102 Cal.App.4th 1084, 1093–1094; *People v. Clark* (1996) 45 Cal.App.4th 1147, 1157–1158.)

II. The Finding that Defendant’s 1997 Conviction was a Serious Felony.

Defendant also argues that the evidence fails to support the trial court’s finding that his 1997 conviction for assault by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)) was a “serious felony” within the meaning of Penal Code

section 667, subdivision (a)(1). The evidence presented to prove the third prior serious felony conviction enhancement allegation established that on January 29, 1997, defendant was convicted pursuant to a plea of nolo contendere to the charge of assault with a deadly weapon, his “**FEET AND HANDS,**” or by means of force likely to produce great bodily injury, and was sentenced to state prison for a total of 11 years. Defendant claims that the prior conviction as proved by the evidence “does not constitute a serious felony that will sustain the imposition of a five-year enhancement under section 667, subdivision (a).” He therefore requests that we “strike the five-year term” added to his sentence for the prior conviction.

We agree with the Attorney General’s concession that the evidence offered at trial did not adequately prove the 1997 prior conviction for a violation of Penal Code section 245, subdivision (a), is a “serious felony” as defined by Penal Code sections 667, subdivision (a)(1) and 1192.7, subdivision (c). Penal Code section 245, subdivision (a)(1), “punishes assault committed *either* by means ‘likely to produce great bodily injury’ (GBI), *or* by use of ‘a deadly weapon . . . other than a firearm.’ Only the latter version qualifies as a serious felony” under section 667, subdivision (a)(1). (*People v. Delgado* (2008) 43 Cal.4th 1059, 1063.) The California Supreme Court has concluded that “a ‘deadly weapon’ within the meaning of section 245 must be an object extrinsic to the human body. Bare hands or feet, therefore, cannot be deadly weapons . . .” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1034.) Accordingly, the evidence of defendant’s 1997 conviction does not prove the third alleged prior serious felony conviction, and the five-year enhancement must be stricken.

DISPOSITION

The judgment is modified to strike the five-year enhancement imposed for the third alleged prior serious felony conviction. The trial court is directed to modify the abstract of judgment as indicated herein, and to send the modified abstract to the Department of Corrections and Rehabilitations. In all other respects the judgment is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.